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Summary record of the 2515th meeting
Held at Headquarters, New York, on Wednesday, 19 March 2008, at 11 a.m.

Chairperson: Mr. Rivas Posada

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The meeting was called to order at 11.10 a.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Initial report of Botswana (CCPR/C/BWA/1; CCPR/C/BWA/Q/1)

1. *At the invitation of the Chairperson, the members of the delegation of Botswana took places at the Committee table.*

2. **Mr. Skelemani** (Botswana), introducing the State party's initial report (CCPR/C/BWA/1), said that Botswana's commitment to the promotion and protection of human rights and fundamental freedoms was evidenced, inter alia, by its accession to eight of the thirteen core human rights treaties and by its support for the new Human Rights Council and the universal periodic review mechanism.

3. Since its independence, Botswana's adherence to the basic principles of democracy, its respect for the rule of law and its willingness to enter into dialogue had made it the envy of many. There had been significant progress towards gender equality, and efforts to reduce poverty levels had borne fruit: the poverty rate had decreased from 47 per cent in 1994 to 30 per cent in 2004. The fight against HIV/AIDS remained a challenge, but the Government was hoping to reduce the number of deaths and new infections.

4. Over the past decade, Botswana had emerged as a worldwide leader in terms of economic freedom, transparency and good governance and had established a number of institutions designed to promote good governance and accountability. Its steady economic growth was largely attributable to revenue from the mining industry and the prudent management of resources, most of which had been used to enhance human capital and improve infrastructure throughout the country. Education, health and other social services were available to all citizens, regardless of their tribal or ethnic origin, and the eradication of illiteracy was among the Government's priorities. As a young democracy, Botswana placed particular emphasis on nation-building and development and had no doubt that the measures implemented in those spheres would contribute to the full enjoyment of human rights by all its citizens.

5. **The Chairperson** invited the delegation to address questions 1-13 on the list of issues (CCPR/C/BWA/Q/1) and in that connection drew attention to a document containing written responses from Botswana.

6. **Mr. Skelemani** (Botswana) apologized for the late submission of the written replies to the list of issues. Referring to question 1, he said that international treaties and agreements did not have the force of law in Botswana until they had been incorporated into its domestic legislation. However, given that the act of acceding to such treaties and agreements indicated the Government's intention to abide by their provisions, the courts made every effort to interpret the Constitution and statutes in such a way as to ensure respect for the country's international commitments. Although the Covenant had not yet been incorporated into domestic legislation, the Constitution, if properly read and barring a few grey areas, was broadly in line with its provisions.

7. There had been no training workshops on the Covenant for members of the judiciary because judges were required to take account of the provisions of international treaties and agreements when interpreting domestic laws and were therefore presumed to be familiar with them.

8. **Mr. Makgonatsotlhe** (Botswana), referring to question 2 on the list of issues, said that, while no specific measures had been taken to raise awareness among traditional leaders of tribes of the rights protected by the Covenant, it should be emphasized that those leaders were not permitted to enforce customary law, which was unwritten and varied from tribe to tribe. It would be extremely difficult to incorporate the provisions of the Covenant into customary law.

9. As for the role and responsibilities of the Ombudsman (question 3), the Office of the Ombudsman had been established in 1995 by act of parliament. Its mandate was limited to issues relating to maladministration in the public sector and thus human rights violations committed in the private sector fell outside the scope of its jurisdiction. Over the preceding five years, the Office had received complaints relating, inter alia, to unlawful arrests and arbitrary detention. Although technically an independent entity, the Ombudsman's office was expected to submit annual reports to Parliament. The State party was committed to the promotion and protection of human rights and would therefore

consider the recommendations concerning the establishment of independent national human rights institutions set out in the Vienna Declaration and the African Charter on Human and Peoples' Rights in due course.

10. On the issue of constitutional exceptions to the principle of non-discrimination (question 4), section 15, subsection 4, of the Constitution stipulated that a law would not be regarded as discriminatory insofar as it made provision with respect to persons who were not citizens of Botswana and with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. In order to regulate the employment and other remunerated or profitable activities of individuals who were not citizens, Parliament had passed the Employment of Non-Citizens Act, which required such persons to obtain work permits before engaging in any activity for reward or profit. The Abolition of Marital Power Act of 2004 provided for equality between spouses by abolishing discriminatory common law provisions. The promulgation of that Act had served to endorse the right to equal protection under the law afforded to every citizen pursuant to article 3 of the Constitution.

11. **Ms. Mogami** (Botswana), in answer to question 5, said that while customary law continued to be implemented, the State had empowered women through legislation. Women were now able to acquire and dispose of property as and when they wished, without being required to refer to a guardian. An interpretation of the Abolition of Marital Power Act, to the extent that it dealt with immovable property, protected women's property rights.

12. **Mr. Makgonatsotlhe** (Botswana) said that the law in Botswana criminalized same-sex sexual activity (question 6) because the nation viewed such sexual acts as immoral. Botswana considered as *contra bonos mores* that which the nation traditionally held as contrary to traditional and religious beliefs.

13. **Mr. Skelemani** (Botswana), referring to question 7 on the list of issues, pointed out that article 6, paragraph 2, of the Covenant recognized that capital punishment existed in some countries; therefore, the only point open to discussion was the types of crimes that were serious enough to warrant the death penalty. In the courts, the death sentence could not be pronounced against any person under the age of 18 or against pregnant women. Such a sentence could be imposed in the case of premeditated murder, as it often involved people taking life in order to improve their own circumstances. Another instance in which the death penalty was justifiably imposed was ritual killings, in which a person's organs might be removed while the victim was still alive. Upon consultation, the citizens of Botswana had expressed a preference for maintaining the death penalty. Therefore, the issue of capital punishment must continue to be debated until the majority in Botswana was of the view that it should be abolished; until then, the law would be applied as it stood.

14. Regarding the prerogative of mercy, he observed that every murder case had to be submitted to the Court of Appeals, as the highest court in the land. If a death sentence was pronounced, the case was then referred to the President of Botswana. The President based his decision on the advice of the Advisory Committee, whose consultations involved asking the judge who had tried the case whether there were any grounds for diminishing the convicted person's moral responsibility, other than any extenuating circumstances. Only if there was no such extension would the President sign the order for execution.

15. Turning to question 8 on the list of issues, he said that while there was no constitutional authorization for any form of punishment resembling torture, section 7, paragraph 2, of the Constitution did authorize punishment that had been lawful in Botswana immediately before its entry into force. However, that matter was also open to debate and Botswana looked forward to further discussion on the topic.

16. The decision in *Clover Petrus and Another v. State* outlawed the imposition of corporal punishment in instalments. In other words, the decision objected to the manner in which corporal punishment was administered, but did not have the effect of abolishing its application in general; corporal punishment thus remained lawful in Botswana.

17. **Mr. Makgonatsotlhe** (Botswana), responding to question 9, said that the Prisons Act prohibited any form of ill-treatment of prisoners. Section 46, paragraph 1, of that Act laid down officer-related offences, some of which directly addressed the issue of ill-treatment, for example, unwarranted personal violence against any person in custody. Prisoners alleging ill-treatment could lodge complaints with the competent Minister, prison officers, visiting judicial

officers or the prison inspections committee. Officers accused of ill-treating prisoners were required to appear before a Board of Enquiry, whose purpose was to establish the facts of the case and to recommend disciplinary action, if necessary. The Board of Enquiry was independent and, as such, could conduct a fair investigation; its recommendations were consistently acted upon. Data on complaints and their outcome existed and would be provided in written form in due course.

18. **Ms. Mongwa** (Botswana), turning to question 10, said that domestic violence as such had not been legally defined in Botswana, although acts of violence, such as assault or inflicting grievous bodily harm, were prosecutable offences. As a result, separate statistical data on domestic violence were not currently available.

19. There were a number of governmental and non-governmental organizations that dealt with violence, although not necessarily specifically with domestic violence. Examples included the Botswana Police Service, the Department of Social Services and the Women Against Rape Association, which provided counselling, among other things. To better address the issue of domestic violence, a Domestic Violence Bill had recently been passed by Parliament and was expected to receive presidential approval in the near future. That was a positive development, as the Bill not only defined domestic violence as a criminal offence, but provided comprehensive legislation to protect and seek justice for victims. It also meant that in future statistical data would be available on the occurrence of domestic violence.

20. **Mr. Mokgothu** (Botswana), responding to question 11, said that the law in Botswana allowed the police to hold a person in custody for a maximum of 48 hours; a warrant had to be obtained for any detention beyond that limit. There were no data on the average length of pre-trial detention. Furthermore, everyone, including indigent persons, had the right of access to a lawyer.

21. Overcrowding in prisons (question 12) was a major problem in Botswana. The current total capacity of prison facilities was 3,994 prisoners, but as at November 2007, there had been 6,042 prisoners, including remands. The prison population included 4,626 convicted males and 115 convicted females. Efforts were being made to correct the situation by building additional cells, which would reduce overcrowding by at least 10 per cent for the period 2007-2010. Another measure being considered was the introduction of community service orders as part of the judicial sentences.

22. **Mr. Skelemani** (Botswana), in answer to question 13, said that hitherto Botswana had had no reason to consider that the current visiting time of 20 minutes was inadequate. He pointed out that communication through correspondence was separate from that restriction.

23. Under Botswana law, the bodies of condemned prisoners were buried in the prison yard, as it was believed that asking the executed prisoner's relatives to collect the body themselves would be excessively distressing for them, especially given the condition of a body after execution. In the past, very close family members had in fact been informed of the date of scheduled executions, but as a result, the prison service had been inundated with requests to change the date, for reasons of convenience. Therefore, considering that the law did not stipulate that families were required to be informed, the State had decided to discontinue the practice. In his long career, he had not met many individuals who would seek to have that information; indeed, a typical Botswana national would not see any point in collecting a prisoner's body once the execution had been carried out. On that issue also, however, Botswana was not closed to discussion and would certainly give consideration to the idea of allowing last visiting rights to a convict's family prior to execution.

24. **The Chairperson** invited the members of Committee to raise questions with the delegation.

25. **Mr. O'Flaherty**, noting with concern the reservations made to articles 7 and 12 of the Covenant, said that the reservation to article 7 was particularly unusual in the light of Botswana's democratic achievements, as it suggested that the State party wished to take a position contrary to established prescriptive norms of international law regarding the prohibition of torture. At the time of Botswana's ratification of the Covenant, two States parties had considered the reservations to be illegal given their wide scope. He wondered whether the Government of Botswana would consider withdrawing those reservations at the earliest possible opportunity.

26. Notwithstanding the fact that the initial report had been submitted late, precluding a dialogue with the Committee for a number of years, the report was

informative, consistent with the reporting guidelines and, on occasion, self-critical. However, more information on the actual situation on the ground rather than on the legislative framework in a given area would have been helpful. For example, it would have been useful to have more disaggregated data, particularly on issues relating to articles 2 and 3. The report failed to discuss certain issues of great interest to the Committee such as the world-wide problem of human trafficking, which States parties typically addressed under article 8. Some sections of the report were very short, such as those concerning the implementation of articles 17 and 27.

27. Noting that the incorporation of the provisions of the Covenant in domestic legislation helped States parties to implement the Covenant effectively, he wondered whether the Government would reconsider directly incorporating those provisions in Botswana law. A number of States with dualist legal systems such as his own country, Ireland, had recognized the need for such action. For example, Ireland had incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms into domestic law. There were some incompatibilities between the constitutional framework of Botswana and the provisions of the Covenant, for example regarding the grounds of non-discrimination. There seemed to be a general lack of awareness of the Covenant within the judiciary and the legal profession. The Covenant had been cited in only one or two domestic cases. He therefore suggested targeted professional educational programmes concerning the Covenant for judges and lawyers; there were many regional human rights capacity-building and education programmes to assist in such endeavours.

28. In question 2 of the list of issues, the Committee was not proposing the integration of international human rights law into customary law. Customary law was very complex and fulfilled valuable social functions for which international treaties were not designed. Nevertheless, that unwritten body of law must be applied in a manner which did not violate the human rights of the people of Botswana under the Covenant. The Government should therefore consider raising awareness of the Covenant among the practitioners of customary law and devising methods of oversight to ensure that no procedures violated it. The question of whether the local police took into consideration the rights protected under the Covenant had been raised because, technically, they were officers of the customary courts according to the report. As the role of the local police in promoting human rights was crucial, he would appreciate information on relevant awareness-raising activities.

29. He noted with concern the limited scope of competence of the Office of the Ombudsman. For example, it could not deal with complaints about current or former office-holders or the police or measures to protect the security of the State. Noting allegations from non-governmental sources that the Office did not always act in an independent manner, he said he would welcome the views of the delegation on the alleged constraints on its authority. Information was also needed on the extent to which the staff of the Office were equipped and trained to guarantee the rights under the Covenant. Lastly, he urged the delegation to consider the possibility of establishing a national human rights institution in accordance with the Paris Principles, as proposed by the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child.

30. **Mr. Iwasawa**, commending the Government of Botswana on the submission of its initial report, said that the country had had considerable success in nurturing economic prosperity, political stability and democracy. With respect to question 4 on the list of issues concerning exceptions to the principle of non-discrimination, he referred to section 15 of the Constitution, which stated that no law would make any provision that was discriminatory either of itself or in its effect. However, in accordance with its subsection 4 (b), that provision did not apply to persons who were not citizens of Botswana. While the Employment of Non-Citizens Act referred to by the delegation in its written responses to the list of issues was important, it covered only employment and did not address other human rights areas. He would like to know whether asylum-seekers and refugees enjoyed the human rights guaranteed under the Constitution and the Covenant. He also noted with concern that subsection 4 (c) made an exception to the principle of non-discrimination with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. While the Abolition of Marital Power Act was indeed a milestone, it did not address the foregoing exceptions and excluded a wide range of areas from the principle of non-discrimination. He asked the delegation to respond to the concerns raised

over section 15, subsection 4 (d) of the Constitution, which made exceptions to the principle in the case of members of a particular race, community or tribe of customary law. He also drew attention to article 26 of the Covenant concerning protection against discrimination on grounds including race, colour and national origin. Clarification was also needed on subsection 9, which authorized the implementation of the discriminatory laws in force.

31. He noted with concern that customary law might be applied in a manner inconsistent with the Covenant. According to the report, neither the Marriage Act nor the Matrimonial Causes Act applied to marriages contracted under customary law. It was unclear whether the Abolition of Marital Power Act applied to such marriages. He would like to know how marriages under customary law were regulated and which laws applied to them. Information was needed on how equality between men and women was guaranteed in customary marriages. He further asked whether the Government of Botswana planned to take steps to prohibit polygamy under customary law. Clarification was needed about the provision under customary law by which custody of children in cases of separation or divorce was granted to the father's family and the mother only had visiting rights. Noting that property disputes between cohabitants were no longer dismissed by the customary courts as often as in the past, he enquired whether such disputes could be heard in other courts. He also asked what steps had been taken to address the lack of legal capacity of women under customary law mentioned in the report, whereby unmarried women were subjected to the guardianship of their fathers, brothers and uncles and married women to their husbands. He noted with concern the requirement under the Constitution, which applied only to women, that for the purposes of establishing jurisdiction in matrimonial cases a wife must be resident in Botswana for a continuous period of three years immediately preceding the date of the institution of proceedings. It was not clear how the difference in treatment between men and women was justified. He commended the decision by the High Court in the *Unity Dow v. Attorney-General* case, as it had helped the Government of Botswana to eliminate gender discrimination in its law on citizenship. He would like to know how the National Gender Programme Framework referred to in the report had enhanced the status of women.

32. While he recognized the scale of the problem of HIV/AIDS which the Government of Botswana was facing, that was no justification for criminalizing same-sex sexual activity. He recalled the Committee's views on Communication No. 488/1992: *Toonen v. Australia* (CCPR/C/50/D/488/1992 (1994)), in which the Committee had noted that the criminalization of homosexual practices could not be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS and concluded that such a law was in violation of article 17 of the Covenant. It could be argued that it also amounted to discrimination based on sexual orientation, in violation of article 26.

The meeting rose at 1 p.m.